Supreme Court, U. S.
FILED
APR 8 1980
MICHAEL RODAK, JR., CLERK

79-6376

IN THE UNITED STATES SUPREME COURT

MARVIN E. BARNETT,

Petitioner Pro Se,

Versus

THE STATE OF OKLAHOMA and
PETER A. DOUGLAS, Warden et. al.,

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
AND SUPPORTING AFFIDAVIT (Pursuant to U.S.C. 1915)

STATE OF OKLAHOMA)
) ss:
COUNTY OF CLEVELAND)

I hereby apply for leave to pursue this action under 28 U.S.C. 1254 and U.S.C. Const. Art. 3, § 2, cl 2, without prepayment of fees and costs or giving security therefor.

In support of my application, I state under oath that the following facts are true:

(1.) I am the party initiating said action and believe that I am entitled to redress.

(2.) The nature of this action is a petition for writ of Certiorari.

(3.) I am unable to prepay the costs of this action or give security therefor because of my poverty.

(4.) I have no assets or funds which could be used to prepay the fees or costs.

(5.) During the proceeding twelve months the only monies I have received is a small amount from my family for mantaining my personal hygiene.

Marvin E. Barnett
Signature of Movant

Subscribed and sworn to before me this 3 day of April 1980.

My commission expires: 1-28-84 1980.

Doyle Edward Blythe
NOTARY PUBLIC

CERTIFICATE

I hereby certify that the movant herein has cash and securities in the amount of $2.45 on account to his credit at the penal institution where he is confined.

Doyle Edward Blythe
Authorized officer of Penal Institution

Case Manager I
Title

IN THE UNITED STATES SUPREME COURT

MARVIN E. BARNETT,
Petitioner Pro Se,

Versus

THE STATE OF OKLAHOMA and
PETER A. DOUGLAS, Warden et. al.,
Respondents.

PETITION FOR WRIT OF CERTIOTATI

CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TINTH CIRCUIT

Comes now, Marvin E. Barnett, the petitioner in the above entitled action, acting totally prose, and states that he is a prisoner of the State of Oklahoma at Lexington Assessment and Reception Center, Lexington, Oklahoma. The petitioner is incarcerated as a result of a judgement and sentence of life from Oklahoma County District Court, Oklahoma rendered on the 3rd day of July 1965, case no. CRF-30301. Appeals were filed seeking to secure petitioner's right to a direct appeal under the due process and equal protection clause. A-14698, A-14727, 446 P. 2d 89. The appeals were denied as was hes writ of Habeas Corpus in the Western District of Oklahoma, CIV-78-1006-D.

The petitioner then appealed the Federal District Court's ruling to the United States Tenth Circuit. Case no. 79-1283; That Court affirmed on the 7th day of March 1980. See appendix "A". The petitioner does not have a copy of his prior decisions however, he has filed an application for the Court of Appeals to transmit his original trial transcript and record on appeal. See appendix "B".

The petitioner respectfully prays that a writ of Certiorari be issued to review the opinion and judgement of the United States Court of Appeals for the Tenth Circuit entered on the 7th day of March 1980.

JURISDICTION

The decision rendered on March 7th, 1980, by the United States Court of Appeals for the Tenth Circuit is in direct conflict with other Courts of Appeal on the same matter. Jurisdiction of this Court is invoked under U.S.C. title 28 § 1254 and U.S.C. Const. Art. 3 § 2, cl 2. Chaffin v. Stynchcombe, 412 U.S. 17, 93 S. Ct. 1977, 36 L.Ed. 2d 714 (1973). National Cable Television Asso. v. United States 415 U.S. 336, 94 S.Ct. 1146, 39 L. Ed. 2d 370.

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not the petitioner was denied due process and equal protection when he was denied the right to a direct appeal through no fault of his own?
2. Whether or not the petitioner was denied effective assistance of counsel on appeal when his attorney abandoned him without notice to either petitioner or the courts?
3. Whether or not the lower courts systematically denied the petitioner meaningful access to the courts by denying him a copy of the original 1965 trial transcripts; said denial making a direct appeal impossible for a person indigent and unschooled in the law?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertain by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defence.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction therof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The precise matter complained of here is that your petitioner has been denied effective assistance of counsel and due process under the law. At all times the petitioner desired an appellate review of his conviction. None of the lower courts have touched upon the question of abandonment raised by the petitioner. Petitioner relies heavily upon Scobie v. State, 239 F. Supp. 646 (E. D. Okla.) wherein that court held:

> Where convicted state prisoner had been deprived of his right to appeal by his attorney who alone made the decision not to appeal against the petitioner's clearly expressed desire to have appellate review of his conviction and sentence, state prisoner did not have effective assistance of counsel on appeal and justice required that state prisoner be afforded his right to appeal with reasonable dispatch or that he be released from custody.

The denial ones right to counsel on appeal constitutes a violation of the 14th amendment's due process clause. The violation caused by abandonment has left the petitioner not only without effective assistance of counsel on appeal but just as important petitioner has been denied a copy of the original 1965 trial transcripts; so necessary for effective and adequate access to the courts.

ARGUMENT AND AUTHORITIES

In this instant case the United States Court of Appeals for the Tenth Circuit affirmed the decisions of the district Court which said petitioner had not been denied effective assistance of counsel on appeal, eventhough the original record will reflect no appeal was ever filed and the petitioner nor the court was notified of the attorney's action or inaction. The record will reflect that the petitioner has never had a direct appeal on the merits of this case; a very critical stage in the criminal process. The court uses Plaskett v. Page, 439 F. 2d 770 (10th Cir. 1971); this decision is in direct conflict with other Courts of Appeals regarding the question of abandonment on appeal by retained counsel.

Petitioner must rely on Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L. Ed. 2d 72, because he is indigent and unschooled in the law; all his petitions have been pro se without any assistance from anyone trained in the law.

It cannot be said that the petitioner herein, had effective assistance of counsel on appeal. When counsel improperly abandons his client without notification to him or the trial court and fails to inquire as to whether the client is able to hire another attorney, the representation can hardly be termed effective. Douglas v. Calif., 372 U.S. 353, 83 S. Ct. 814; and Anders v. Calif., 386 U.S. 738, 87 S. Ct. 1396.

The denial of ones right to counsel on appeal merely because originally he had privately retained counsel and subsequently became indigent and unable to hire counsel at his own expense, there is no sound and/or rational basis for afforded him less protection of his appellate rights, than would be afforded a defendant who was initially indigent and had the benefit of appointed counsel from the beginning of the criminal proceedings.

The Sixth Circuit in Boyd v. Cowen, 394 F. 2d 388 (1974) held that regardless of whether counsel is privately retained or court appointed, there is a constitutional denial of right to appeal by reason of failur of counsel to perfect an appeal. The Sixth Circuit gave particular emphasis to the fact that the duty of an attorney to communicate with his client fully and promptly is particularly compelling when the latter is incarcerated. This is of course precisely the case of the petitioner.

As the court state in Boyers v. Coiner, 309 F. Supp. 1064 (S. D. W.Va. 1970):

> We regard a sound law that when employed counsel fails to take in appeal within the time permitted, without clearly informing his client of his intentions not to do so, and without assisting or offering to assist the client in having other counsel appointed in his place, the retained counsel has breached his duty to his client and the latter's constitutional right to effective assistance of counsel on appeal under the 6th amendment has been violated.

The following cases are in direct conflict with the decision rendered in this instant case by the Court of Appeals for the Tenth Circuit:
United States ex. rel. Maselli v. Reinsake, 383 F. 2d 129 (2d Cir. 1967); Turner v. North Carolina, 412 F. 2d 486 (4th Cir. 1969); Williams v. Coiner, 392 F. 2d 210 (4th Cir. 1968); Chaffin v. United States, 469 F. 2d 634 (5th Cir. 1972); Atilus v. United States 406 F.2d 694 (5th Cir. 1969).

The facts set forth that there was an abandonment of petitioner's appeal by his privately retained counsel, and that abandonment took place shortly after the date of the petitioner's sentencing. When petitioner's counsel abandoned this appeal it was done without prior notice to him or the trial court.

CONCLUSION

Wherefore premises considered, your petitioner prays that this Honorable Court reverse the decision rendered by the Court of Appeals for the Tenth Circuit and/or grant him full appellate review of his original 1965 trial; which he is entitled to. This and any other relief that this Honorable Court deems fair and just.
It is so prayed.

Respectfully submitted,
Marvin E. Barnett
Marvin E. Barnett #72361
Petitioner pro se

VERIFICATION

STATE OF OKLAHOMA)
) ss:
COUNTY OF CLEVELAND)

I, Marvin E. Barnett, the undersigned being first duly sworn, states that he is the petitioner in the above action and that the information contained therein is true and correct to the best of my knowledge, beleif and memory.

Marvin E. Barnett
Signature of Petitioner

Subscribed and sworn to before me this 3 day of April 1980

My commission expires: 1-28-84

Doyle Edward Blythe
NOTARY PUBLIC

Appendix "A"

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
MAR 7 1980
HOWARD K. PHILLIPS
Clerk

MARVIN E. BARNETT,

Petitioner-Appellant,

v.

MACK H. ALFORD, Warden and THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,

Respondents-Appellees.

No. 79-1283

Appeal from the United States District Court
For the Western District of Oklahoma
(Civ. No. 78-1006-D)

Submitted on the briefs pursuant to Tenth Circuit Rule 9:

Marvin E. Barnett, pro se.

Jan Eric Cartwright, Attorney General, and Carol Elaine Alexander, Assistant Attorney General, the State of Oklahoma, Oklahoma City, Oklahoma, for Respondents-Appellees.

Before SETH, Chief Judge, PICKETT and McWILLIAMS, Circuit Judges.

PER CURIAM

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed.R.App.P. 34(a); Tenth Circuit R. 10(e). This cause is therefore ordered submitted without oral argument.

Appellant Barnett was convicted in 1965 in an Oklahoma state court of murder. After exhausting his state post conviction remedies, Barnett filed a petition for a writ of habeas corpus in the district court, alleging he had been denied effective assistance of counsel and his right to appeal by the failure of his retained attorney to file an appeal of his state murder conviction. Appellant alleges that although he wanted to appeal, his retained counsel did nothing. The district court dismissed Barnett's petition. We affirm.

This case is controlled by our decision in Plaskett v. Page, 439 F.2d 770 (10th Cir. 1971). As in Plaskett, appellant Barnett did not request appointment of other counsel; he does not claim to be indigent; and the state imposed no impediment to his appeal. The failure of retained counsel to perfect an appeal is neither a denial of due process nor a ground for federal habeas corpus relief. 439 F.2d at 771.

Affirmed. The mandate shall issue forthwith.

Appendix "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARVIN E. BARNETT,
Petitioner-Appellant,

vs.

Case number 79-1283

THE STATE OF OKLAHOMA and
PETER A. DOUGLAS, Warden et. al.,
Respondents-Appellees.

APPLICATION TO TRANSMIT TRANSCRIPT OF TRIAL, RECORD ON APPEAL, ALL PLEADINGS, ORDERS AND OPINIONS TO THE CLERK OF THE UNITED STATES SUPREME COURT, WASHINGTON, D.C.

Comes now, Marvin E. Barnett, the petitioner, in the above entitled and numbered cause, and Requests this Court to transmit transcript of the original trial, record on appeal, all pleadings, orders and opinions in the above styled cause.

The petitioner has filed a petition for Writ of Certiorari in the United States Supreme Court styled Marvin E. Barnett versus the State of Oklahoma and Peter A. Douglas, Warden et. al. Said Court has need of the original trial transcript, record on appeal, all pleadings, orders and opinions filed in case number 79-1283 (10th Cir.), CIV-78-1006-D (D C Okla.), Okla. County Court case 30301.

Therefore, petitioner respectfully requests this Court to order the clerk of the United States Court of Appeals for the Tenth Circuit to transmit by registered mail, return reciept requested, transcript of the original trial, record on appeal, all pleadings, orders and opinions contained in the files of the clerk of this Court in the above mentioned cause to the United States Supreme Court, Washington, D. C.

Respectfully requested,
Marvin E. Barnett
Marvin E. Barnett, #72361
Petitioner Pro Se
Rte 1 Box 260
Lexington, Oklahoma 73051

Suscribed and Sworn to before me
this 3 day of april 1980
My Commission expires: 1-28-84
Doyle Edward Blythe
NOTARY PUBLIC

CERTIFICATE OF SERVICE

I, Marvin E. Barnett, the petitioner in the above entitled action certify that a true and correct copy of the foregoing documents were placed in the prison mail deposit on the 3 day of april 1980 to Jan Eric Cartwright, attorney for the respondents.

Marvin E. Barnett
Marvin E. Barnett #72361
Petitioner Pro Se

MAY 22 PAGE 8

No. 79-6376

Supreme Court, U.S.
FILED
MAY 9 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

MARVIN E. BARNETT,

Petitioner,

-vs-

THE STATE OF OKLAHOMA, and
PETER A. DOUGLAS, Warden, et al.,

Respondents.

RESPONSE BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

JAN ERIC CARTWRIGHT
ATTORNEY GENERAL OF OKLAHOMA

C. ELAINE ALEXANDER
ASSISTANT ATTORNEY GENERAL

112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

ATTORNEYS FOR RESPONDENTS

May, 1980

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

MARVIN E. BARNETT, Petitioner,	)	
v.	)	No. 79-6376
THE STATE OF OKLAHOMA, and PETER A. DOUGLAS, Warden, et al., Respondents.	)	

RESPONSE BRIEF OPPOSING
PETITION FOR WRIT OF CERTIORARI

COMES NOW Jan Eric Cartwright, Attorney General for the State of Oklahoma, by and through C. Elaine Alexander, Assistant Attorney General, on behalf of the above-named respondents, and in opposition to the Petition for Writ of Certiorari, and submits to this Honorable Court the following brief in opposition thereto.

I.

JURISDICTION

Petitioner Barnett seeks review by way of a pro se Petition for Writ of Certiorari from a decision rendered by the United States Court of Appeals for the Tenth Circuit. On the 7th day of March, 1980, a three-member panel of the aforesaid Court, composed of Judges Seth, Pickett and McWilliams, in Case No. 79-1283 affirmed the denial of habeas corpus relief rendered by the Honorable Fred Daugherty, United States District Judge for the Western District of Oklahoma, in Case No. CIV-78-1006-D.

II.

ISSUES PRESENTED

1. Whether Petitioner Barnett was denied the statutory right to direct appeal in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

2. Whether Petitioner Barnett was denied effective assistance of counsel upon appeal in violation of his Sixth and Fourteenth Amendments rights established by the United States Constitution.

3. Whether Petitioner Barnett was denied his right to access to the courts in violation of the Fifth and Fourteenth Amendments of the United States Constitution by the refusal to furnish a transcript at public expense after the appeal time had expired.

III.

STATEMENT OF THE CASE

Petitioner, Marvin E. Barnett, hereinafter referred to as "Mr. Barnett", was charged by Information with Murder in the First Degree, in violation of Okla. Stat. tit. 22, § 701 (1961), in the District Court of Oklahoma County, State of Oklahoma. Mr. Barnett was tried by jury on June 14 through 26, 1965, and was duly represented by privately retained counsel from arraignment through the appeal time period. The jury thereafter returned a verdict of guilty and assessed punishment at life imprisonment under the custody and control of the Department of Corrections.

Mr. Barnett failed to perfect his appeal from the aforesaid Judgment and Sentence to the Oklahoma Court of Criminal Appeals within the time set forth in Okla. Stat. tit. 22, § 1054 (1965) and Okla. Stat. tit. 22, § 1055 (1961).

On October 19, 1965, Mr. Barnett filed an application for case-made at public expense which was overruled by the trial court for failure to give notice of intent to appeal as provided in Okla. Stat. tit. 22, § 1060 (1965). Thereafter an Application for Post-Conviction Relief, Case No. A-14,508, and a Writ of Habeas Corpus, Case No. A-14,727, were filed by Mr. Barnett on the issues raised herein in the Oklahoma Court of Criminal Appeals. Combining two separate petitions for dispostion, the Oklahoma Court of Criminal Appeals denied Mr. Barnett the requested relief, the decision rendered being recorded in the official reporter as Barnett v. State, 446 P.2d 89 (Okl.Crim. 1968). Once again, in 1978, Mr. Barnett raised the identical issues in an Application for Post-Conviction Relief in the District Court of Oklahoma County, Oklahoma, which denied the Application. That denial was appealed to the Oklahoma Court of Criminal Appeals, pursuant to Okla. Stat. tit. 22, § 1080 et seq., the Oklahoma Post-Conviction Procedures Act, in Case No. PC-78-439, who affirmed the denial.

Mr. Barnett thereafter filed a Writ of Habeas Corpus in the United States District Court for the Western District of Oklahoma, Case No. 78-01006-D. The Honorable Fred Daugherty found that no constitutional violation had occurred and denied the Writ. That denial was appealed to the United States Court of Appeals for the Tenth Circuit in Case No. 79-1283. Assigned to Calendar D, the issue was presented to a three-member panel, Judges Seth, Pickett and McWilliams, by briefs without oral argument. On March 7, 1980, the Tenth Circuit panel affirmed the lower federal court's ruling.

It is from that judgment that Mr. Barnett now comes to this Honorable Court requesting the following relief:

> 1. The grant of the Writ of Certiorari to review the denial of habeas corpus relief by the Tenth Circuit Court of Appeals in Case No. 79-1283 rendered on March 7, 1980; and
>
> 2. Vacation of the final Judgments in Case Nos. PC-78-439, A-14,508, A-14,727, rendered by the Oklahoma Court of Criminal Appeals and Case No. 78-01006-D, rendered by the United States District Court for the Western District, with orders to grant him full appellate review.

IV.

STATEMENT OF THE FACTS

The relevant facts pertaining to the issues presented herein indicate that this matter came on for jury trial in 1965, State of Oklahoma v. Marvin Eugene Barnett, Case No. 30130, and that Mr. Barnett was represented by privately retained counsel throughout all the proceedings. On the date of formal sentencing, July 3, 1965, Mr. Barnett through his counsel gave oral notice of intent to appeal and the trial court gave him an additional sixty (60) days to have a case-made prepared. Mr. Barnett at that time advised that trial court that he did not wish an attorney appointed to perfect his appeal nor a transcript at public expense. No written notice of intent to appeal was ever filed as required by Okla. Stat. tit. 22, § 1060 (Supp. 1965), nor was the appeal perfected to the Oklahoma Court of Criminal Appeals within the statutory time period as provided in Okla. Stat. tit. 22, § 1054 (Supp. 1965). The record fails to establish that Mr.

Barnett's privately retained counsel withdrew from the case or that Mr. Barnett ever informed the trial court of a need for court-appointed counsel or case-made within the statutory appeal time.

ARGUMENT AND AUTHORITY

MR. BARNETT WAS NOT DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE DENIAL OF DIRECT APPEAL AFTER THE EXPIRATION OF THE STATUTORY TIME.

Mr. Barnett sets forth three propositions for review which are in reality a splintering of the one issue of whether the State of Oklahoma may refuse direct appellate review to a person who fails to perfect his appeal within the statutory time limits when the failure is not the result of any state action. Mr. Barnett incorrectly sets forth the Fourth Amendment as the alleged constitutional violation. The interference by a state with the appeal right, access to courts, falls under the Fifth Amendment's due process right, and the ineffective assistance of counsel on direct appeal comes under the rubric of the Sixth Amendment of the United States Constitution.

In McKane v. Durston, 153 U.S. 684 (1894), this Court established that there was no absolute constitutional right to appeal independent of the state's freedom to determine statutory limits. The traditional principle is that a state was not required to allow any appeal for criminal defendants. See Ross v. Moffitt, 417 U.S. 600, 606 (1974); Griffin v. Illinois, 351 U.S. 12, 18 (1956); and Johnson v. United States, 291 A.2d 697, 698 (D.C. 1972). Once the state has granted the appellate right, they may not discriminate upon the basis of inability to pay. See Douglas v. California, 372 U.S. 353, 355 (1963); Burns v. Ohio, 360 U.S. 252, 258 (1959); Griffin v. Illinois, supra; and Anders v. California, 386 U.S. 738, 741 (1967).

Where the defendant has court-appointed counsel, there is sufficient state action to hold any subsequent failure to perfect a direct appeal a deprivation of due process rights. See Turner v. North Carolina, 412 F.2d 486 (4th Cir. 1969); and Scobie v. State, 239 F. Supp. 646 (E.D. Okl. 1965). Similarly, a deprivation of

the due process right to an original appeal may occur when the defendant is uninformed of his rights to a court-appointed attorney, transcript at public cost, and the time limitations even if his counsel is privately retained. For the right to appeal or the decision to abandon it is a person right which no attorney may make for his client. See Boyd v. Cowen, 494 F.2d 338 (6th Cir. 1974), on remand 519 F.2d 182 (6th Cir. 1975); Maselli v. Reinsake, 383 F.2d 129 (2nd Cir. 1967); Chapman v. United States, 469 F.2d 634 (5th Cir. 1972); and Atilus v. United States, 406 F.2d 694 (5th Cir. 1969).

Where there is an affirmative showing that the defendant had been advised of his appellate rights, as in the instant case, the trial court is justified in assuming that the privately retained counsel will protect those rights and that the defendant, aware of those rights, will zealously guard those rights. See Peoples v. United States, 337 F.2d 91 (10th Cir. 1964); and Hannigan v. United States, 341 F.2d 587 (10th Cir. 1965).

When the informed petitioner selects his own counsel who represents him throughout trial and in subsequent proceedings, the failure of his retained counsel to file a notice of intent to appeal or perfect the appeal through suitable arrangement, no habeas corpus action will lie for constitutional deprivation. See Plaskett v. Page, 439 F.2d 770 (10th Cir. 1971); McKee v. Page, 435 F.2d 689 (10th Cir. 1970); Buchanan v. State of Oklahoma, 370 F.2d 199 (10th Cir. 1968); and Schechter v. Waters, 199 F.2d 318 (10th Cir. 1952).

CONCLUSION

Mr. Barnett was informed, as indicated by the record, of his right to court-appointed counsel and case-made at public expense, which he refused. He was also given additional time of sixty (60) days past the six month limit in which to perfect his appeal. Oral Notice of Intent to Appeal was given at the formal sentencing hearing but no written notice was given within ten (10) days. Mr. Barnett failed to notify the trial court of any change in his financial ability or to indicate any need for court-appointed counsel. The State of Oklahoma contends that for the foregoing

reasons, no due process rights of Marvin E. Barnett have been violated; and, therefore, the Petition for Writ of Certiorari should be denied by this Honorable Court.

Respectfully submitted

JAN ERIC CARTWRIGHT
ATTORNEY GENERAL OF OKLAHOMA
112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

ATTORNEYS FOR RESPONDENTS

Of Counsel:

C. ELAINE ALEXANDER
ASSISTANT ATTORNEY GENERAL

AFFIDAVIT OF SERVICE

STATE OF OKLAHOMA)
: ss.
COUNTY OF OKLAHOMA)

I, CAROL ELAINE ALEXANDER, depose and state that I am an attorney in the office of Jan Eric Cartwright, Attorney of record for Respondents herein, and that on May 6th, 1980, pursuant to Rule 33 of the Rules of the Supreme Court, I served one copy of the foregoing brief, by mailing a copy in a duly addressed envelope, wth First Class postage prepaid, to the following named petitioner acting pro se:

Marvin E. Barnett, #72361
Route 1, Box 260
Lexington, OK 73051

C. Elaine Alexander
C. ELAINE ALEXANDER

Subscribed and sworn to before me this 6th day of May, 1980.

Virginia A. Hampton
NOTARY PUBLIC

My Commission Expires:

June 7, 1982

mag

reply MAY 22 PAGE 8

P.O. Box 128
Stringtown, OK 74569
May 10, 1980

RECEIVED
MAY 14 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

Dear Mr. Schade:

In Re: Marvin E. Barnett #72361
Case No. 79-6376

The Attorney General is stuping to the untruth in his response opposing my petition for writ of Certiorari and I feel that I should say something about it.

I was not represented by counsel at my preliminary arraingment and I told the Judge at my sentencing that I did not understand what was being said and that I did want to appeal my conviction.

I did not know anything about that law that became effective in 1965 saying that a person had to have his request for Attorney and Transcript at the expense of the State in writing within ten days after sentencing; I was locked up in the County jail and I did not know anything about the law anyway.

My parents struggled and paid that Lawyer to represent me and the Court knew that I was a pauper because my attorney stated it more than one time in open court; I didn't know what to be indigent or a paupers oath was until I was in the penitentiary. As soon as I learned how to start asking for something for myself (October 1965) I started asking and since then I have been told that I learned how to start asking too late. I certainly did not tell anyone that I did not want an Attorney and my Transcript at the expense of the State. The record shows that I have been trying to get my conviction on appeal since I was sentenced July 3, 1965 to the best of my ability.

In conclusion, if all of my records can be brought before the Court the real truth can be brought out and justice will prevail.

Respectfully submitted,
Marvin E. Barnett
Marvin E. Barnett Pro se

Copy to: Attorney General

19 8 May 22 Cy

RECEIVED
MAY 21 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

MARVIN E. BARNETT,)
Petitioner Pro-Se,)
)
-vs-)
)
THE STATE OF OKLAHOMA, And,)
PETER A. DOUGLAS, Warden, Et Al.,)
Respondent(s).)

Case No. 79-6376

MOTION TO SUPPLEMENT PETITION FOR WRIT OF CERTIORARI

COMES NOW, Marvin E. Barnett, the petitioner herein, to state and make known to this Honorable Court, that:

The Respondent, State of Oklahoma, C. Elaine Alexander, Assistant Attorney General, caused to be filed a "Response Brief Opposing Petition For Writ of Certiorari", wherein the State set forth, as fact, certain matter that is erroneus and, unsupported by any record(s) pertinent to the issues raised by petitioner.

In the "Statement of the Case", the State, at line 5 through 7, states that:

> "* * * and was duly represented by privately retained counsel from arraignment through the appeal time period."

A 'COMPLETE' review of the 'Trail Transcripts' will show beyond any question that petitioner WAS NOT represented by counsel at Preliminary Arraignment. And further, the State, at page #2, lines 10 through 13, states that:

> "Mr. Barnett failed to perfect his appeal from the aforesaid Judgment and Sentence to the Oklahoma Court of Criminal Appeals within the time set forth in Okla. Stat. Tit. 22, Sec. 1054 (1965) and Okla. Stat. Tit. 22, Sec. 1055 (1961)."

Again, a 'complete' review of the records in this instant case will show that Petitioner's retained counsel duly informed the Court of Petitioner's intent to Appeal, and request for Casemade was duly made. When Petitioner became aware of the fact that his attorney of record had 'abandoned' him, Petitioner then made a deligent good faith effort to thus inform the Court. However, thru ignorance of law, a total and complete abandonment by Petitioner's retained counsel of record, and the totality of the hostile environment, Petitioner's late filed application for case-made at public expense was overruled/denied by the District Court.

In support of Petitioner's contention that he was abandoned, Petitioner would again point to the Court Records, which are 'silent' regards Petitioner's retained counsel of record seeking to withdraw after notice was given to the Court of Petitioner's intention to appeal.

Petitioner was charged and convicted upon trial by jury with the crime of Murder, a capital offense, and, was subsequently sentenced to a term of 'Life' imprisonment. Petitioner was not sentenced to ten, twenty, thirty or forty years imprisonment, but, to 'LIFE'! Petitioner informed the Court that he did not know or understand anything about the law or the proceedings, but, that he definitely wanted to appeal. And, ever since petitioner was made aware of his retained counsel's abandonment, petitioner has been 'unsuccessfully' trying to appeal the Judgement of Conviction in this instant case.

In the Case of WILSON v. STATE; Md CtApp, 3/30/79, 25 CrL 2139, the Court held that:

> "Observing that the right to counsel "would be hollow indeed unless the assistance were required to be effective," the Maryland Court of Appeals points out that "(i)t follows that a criminal defendant has the right to the effective assistance of counsel on the direct appeal of the judgment entered upon his conviction of a 'serious' crime."
> (Emphasis added)

In this instant case, where petitioner was sentenced to a term of 'Life' imprisonment for the alledged offense of murder, there can be no question as to the 'seriousness' of the case. The State, knowing that petitioner wanted to appeal, used petitioner's ignorance of the law and retained counsel's abandonment to effectively foreclose and deny petitioner a direct appeal.

Petitioner would like to 'Supplement' the original pleading, now before the Bar of this Honorable Court, and state that at no time, has the State shown any documented proof that petitioner was represented by counsel at District Arraignment, or, that petitioner was informed, after notice of intent to appeal was given to the Court and motion for Casemade was entered into the record, that his retained counsel abandoned him without notice. The State is in effect, penalizing petitioner for the failure of petitioner's retained counsel to inform petitioner and the Court of his intention to withdraw as counsel of record. Thereby affording petitioner an opportunity to retain other counsel or inform the Court of his indigency and ask that counsel be duly appointed for the purpose of perfecting the desired appeal.

This Court has often stated that every citizen of these great United States is protected by the Constitution, and that the State's are foreclosed of depriving and denying to it's citizenry the due process and equal protection of the laws that our Fore-Fathers promulgated to rid the citizens of our Country of the stifling and often 'unjust' deprivations and denials of equality accorded the rich and affluent of other courtries and denied the poor.

WHEREFORE, premises considered and for good cause shown, petitioner pray that this Honorable Court will accept this writting as 'Suplemental' to the original pleading and, render it's decision in the best interest that 'Justice' be served.

It is so prayed.

Respectfully submitted,

/s/ Marvin E. Barnett

Marvin E. Barnett #72361
Stringtown Correctional Center
Post Office Box 128
Stringtown, Oklahoma 74569

PAUPER'S AFFIDAVIT

STATE OF OKLAHOMA)
)ss:
COUNTY OF ATOKA)

Marvin E. Barnett #72361, being first duly sworn under oath, deposes and states that: He is a poor person, without funds, property, friends or relatives who are willing or able to assist him in paying the costs and fees for the filing of the within instrument; it is prayed that this Honorable Court will grant petitioner leave to file and proceed in and as a poor person.

Respectfully Submitted,

/s/ Marvin E. Barnett
Signature of Petitioner Pro-Se

Subscribed and sworn to before me
this 16th day of MAY, 1980.
My Commission Expires: 12/12/81
/s/ DR Blackmon
Notary

STATEMENT OF PRISON ACCOUNT

The following information must be supplied before a petition can be filed forma pauperis, without cost to the petitioner.

The above inmate has in hand on deposit in his Inmate Trust Fund Account, personal funds in the amount of $13.00 XA, as of this date: 5/16/80.

/s/ DR Blackmon
Corrections Dept. Official